INDEX

PETITION: Page No.

The Opinion of the Court Below ..... 2

Jurisdiction of this Court ..... 2

Statement of the Case ..... 2

Question Involved ..... 5

Reasons Why Certiorari Should Be Granted ..... 5

BRIEF IN SUPPORT OF PETITION:

Reference to the Opinion of the Court Below, Jurisdiction of This Court and Statement of the Case ..... 7

Specification of Error ..... 8

Argument ..... 8

*I. It Should be Noted in The First Place, That the Evidence Strongly Tends to Establish That Stallings Did Engage in The Misconduct Attributed to Him* ..... 8

*II. In Any Event, the Board was Without Power to Direct the Petitioner to Employ Stallings, Since it was Established, and Indeed Conceded, That the Petitioner Had no Anti-Union and No Anti-Concerted-Activity Intent or Purpose Whatever in Denying Employment to Stallings* ..... 10

Citations:

Cases Cited

*Martel Mills Corporation vs. National Labor Relations Board,* 114 F2d 624, 631, 632 (C. A. 4) ..... 15

Page No.

*National Grinding Wheel Co., Inc.,*
75 NLRB No. 112; 21 L. R. R. M. 1095 ..... 14, 18

*National Labor Relations Board vs.*
*Industrial Cotton Mills (Division of*
*J. P. Stevens & Co., Inc.)*
208 F2d 87, 91-92 (C. A. 4) ..... 18

*National Labor Relations Board vs.*
*James Thompson & Co.,*
..... F2d ..... (C. A. 2), C. C. H.
Labor Cases p. 84, 944 ..... 16

*National Labor Relations Board vs.*
*Mackay Radio & Telegraph Company,*
304 U. S. 333, 349; 82 L. Ed. 1392 ..... 16, 17, 18

*National Labor Relations Board vs.*
*Remington Rand, Inc., supra.,*
94 F2d, p. 872 ..... 15

*Rubin Brothers Footwear vs.*
*National Labor Relations Board,*
203 F2d 486, 488 (C. A. 5) ..... 13

*The Associated Press vs.*
*National Labor Relations Board,*
301 U. S. 103, 132; 81 L. Ed. 960 ..... 16, 18

Statutes Cited

28 U. S. C. A. 347 ..... 2

28 U. S. C. A. 1254 ..... 2

29 U. S. C. A. 160 ..... 2

29 U. S. C. A. 160 (c) ..... 10

National Labor Relations Act, as
amended, Section 10 (e) ..... 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

---

NO.

---

INDUSTRIAL COTTON MILLS (DIVISION OF J. P. STEVENS & CO., INC.)

*Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

---

## PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Petitioner above named respectfully prays this Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the Petitioner respectfully shows to the Court:

## The Opinion of the Court Below

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 208 F 2d 87.

## Jurisdiction of this Court

Jurisdiction to review, through the procedure of certiorari, the decision of the Court of Appeals in this case is conferred upon this Court by the provisions of Title 28, United States Code, Section 1254 (formerly 28 U. S. C. 347) and Title 29, United States Code, Section 160 (Section 10 (e) of the National Labor Relations Act, as amended).

## Statement of the Case

This case arises out of the following circumstances. The Petitioner operates a textile plant in the Town of Rock Hill, South Carolina. During the Spring and Summer of 1951 the Petitioner's employees at this Plant engaged in a strike extending over a period of approximately four months. It is agreed, however, by the Union which filed the charge initiating this case (49)[1] and by the Labor Board's Trial Examiner (B. A. 6) and by the Labor Board itself (1, B. A. 1) that: — "It is undisputed that the strike was an economic one, neither induced nor prolonged by employer unfair labor practices."

---

[1]Unless otherwise indicated all page references are to the printed appendix to the Company's Brief in the Court of Appeals. References to portions of the record printed in the Appendix to the Board's Brief in the Court of Appeals are designated "B. A." Any references to portions of the written transcript not printed in either appendix are designated "Tr."

The strike involved such tension and turmoil as often accompany a contest of this nature. Yet from the beginning to the end of the entire matter, there is no evidence, and no claim whatever, of any anti-union utterance or action on the part of the Company, or any representative of its management or any of its supervisors.

At the conclusion of the strike the Petitioner took back to work all of its one thousand fifty-seven employees except twenty-one. No violation of the Act has been found in the Petitioner's failure to reinstate these twenty-one, except as to one of them. The Petitioner's failure to take back into its employment this individual, one Matthew Stallings, is the sole subject of the present petition.

It is undisputed that for a number of years the Petitioner has had collective bargaining contracts with the Union; that the great bulk of the Petitioner's employees were Union adherents; that at the end of the strike, as stated above, the Petitioner took practically all of them back to work (Tr. 43); that "among those reinstated or offered reinstatement were all, or substantially all, of the forty-three employees who at the time were officers, shop committeemen or stewards of the Union" (B. A. 7); and that the employee in question, Matthew Stallings, had not been a leader in the strike or in the Union in any way.

As to the Petitioner's failure to reinstate Stallings, the Trial Examiner, whose findings and rulings were adopted in their entirety by the Board, specifically declared (7):—"we must forget anti-union motivation, for I do not think there is (any). There might have been some inference, but if there is, it escaped me."

During the strike, among other incidents of like nature, there were a great number of instances of automobile tires being punctured by roofing nails or tacks

strewn in the public street at and adjacent to the entrance to the Petitioner's premises (10). During the course of these incidents, the Petitioner was informed by Highway Patrolmen of the State of South Carolina that they had caught Matthew Stallings, the employee above named, in the act of strewing such nails or tacks in the street; and on this account the Petitioner refused to take Stallings back to work at the end of the strike (B. A. 5, 10).

At the hearing before the Board's Trial Examiner the Petitioner presented evidence which, it contended, clearly established that Stallings had in fact engaged in the misconduct referred to above. The Petitioner further pointed out that even if it should be found that Stallings had not engaged in such misconduct, still it was clear, and indeed conceded on all sides, that the Petitioner reasonably and in good faith believed that Stallings had done so, and was motivated in its refusal to re-employ him *purely and solely* by this good faith belief. The Petitioner, therefore, contended that since concededly it had acted out of no motive and for no purpose condemned by the Statute, it could not be found guilty of violating the Statute in failing to take Stallings back to work.

The Board made a finding that Stallings had not committed the acts which the State Patrolmen testified they saw him commit. The Board thereupon went on to rule that Stallings was entitled to his job with the Petitioner *absolutely and as a matter of law*, even though the Petitioner had been guilty of no other unfair labor practice in any way related to the matter and even though the Petitioner had not acted out of any anti-union or anti-concerted-activity motives in denying employment to Stallings. The Court below affirmed this ruling, noting, however, that it involved "an interesting and important question of law."

**Question Involved**

The question presented is essentially this:—Does the National Labor Relations Act make any guarantee *of a job* to an employee? Does not the Act rather guarantee to the employee that he *shall not be discriminated against on account of any Union or concerted activity on his part?* Does not the Act simply guarantee to the employee that his employer shall take *no action against him which involves any anti-union or anti-concerted-activity consideration or objective on the part of the employer?*

**Reasons Why Certiorari Should Be Granted**

1. This case involves a question which is of general importance in the administration of the National Labor Relations Act.

2. The decision below represents a fundamental misconception as to the nature, purpose and scope of the National Labor Relations Act.

3. The decision below if projected into future rulings and decisions and not corrected, will result in basic distortion of the National Labor Relations Act.

4. The decision below is contrary to a decision of the United States Court of Appeals for the Fifth Circuit on the same subject, and such conflict should be resolved.

WHEREFORE, upon all of the foregoing and upon the reasoning and authority set forth in the brief annexed hereto, the Petitioner earnestly prays the Court to grant certiorari in this case to the end that this Court may review the decision which has been rendered by the Court below.

Industrial Cotton Mills
(Division of J. P. Stevens & Co., Inc.)
*Petitioner*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

---

NO.

---

INDUSTRIAL COTTON MILLS (DIVISION OF J. P. STEVENS & CO., INC.)

*Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

### Reference to the Opinion of the Court Below, Jurisdiction of This Court and Statement of the Case

There is hereinabove set forth, in the Petition for Writ of Certiorari, reference to the opinion of the Court below and to the statutory authority for this Court's jurisdiction to review the lower Court's decision, together with a statement as to the facts and circumstances of this case.

**Specification of Error**

The Petitioner assigns as error the lower Court's upholding of the order, which the Board has issued against the Petitioner, directing the Petitioner to reinstate Matthew Stallings into its employment and pay back wages to him and post "cease and desist" notices throughout its Plant.

## ARGUMENT

### I

***It Should be Noted in The First Place, That The Evidence Strongly Tends to Establish That Stallings Did Engage in The Misconduct Attributed to Him.***

The Labor Board concedes, of course, that if Stallings did commit the wrongful acts which the Petitioner understood he committed, then the Board had no grounds to complain of the Petitioner's failure to take him back to work at the end of the strike (Board's Brief in Court of Appeals p. 16). Although the Board made a finding that Stallings had not engaged in misconduct, and the Court below accepted such finding, it would seem worthwhile and pertinent to review briefly the evidence on this.

As hereinabove indicated, two Highway Patrolmen of the State of South Carolina testified positively and unequivocally that Stallings did deliberately throw nails or tacks in the street at one of the entrances to the Petitioner's premises; that they each saw him do it; and immediately took him into custody for doing so (11, 14, 15).

These officers were in no way connected with the Petitioner; their veracity was in no way impeached and their account of the matter not in any respect shaken on

cross-examination. Just why the Board saw fit completely to reject their testimony it is difficult to understand—the burden having been admittedly on the Board (Board's Brief in Court of Appeals p. 16) "to prove by a preponderance of the evidence" that Stallings had not misconducted himself, as the Petitioner had been informed he had.

In taking this view the Board seems to have relied on its own declaration or assertion that Stallings was not "formally" arrested (Board's Brief in Court of Appeals p. 5). The officers testified, however, that Stallings was placed under arrest (12, 15). The Board's counsel himself asked the Board's witness, Mrs. Lucy Starnes, if she was in the vicinity where Stallings "was arrested" and where she was standing "at the time of his arrest" (45), and if she saw him "arrested" (45). In her replies Mrs. Starnes stated that she did see Stallings "when they arrested him" (45).

One of the officers told of Stallings being given a paper directing him to appear before a local Judge (12); and Stallings himself testified that he received a legal paper from "the Magistrate" (3). It is true that Stallings was never tried in Court, but neither were various others whom the Petitioner refused to take back to work on account of misconduct on their part during their strike and as to whom the Board finds no grounds of complaint against the Petitioner.

The Board relied on Mrs. Starnes as a "disinterested" witness who "corroborated in detail" Stallings' testimony that he did not throw the nails or tacks (Board's Brief in Court of Appeals p. 4, 18). Mrs. Starnes' testimony was that on the occasion in question she went to the entrance to the Petitioner's premises because "the

crowd usually got out there about that time to jeer at the ones that went in to work" (46) and that "some of them had been slapping some" and "calling one another names" and that she "just went to see what was going to happen out there" (46-47); that she looked around "over both crowds" but did not watch Stallings "in particular" and didn't know, of course, what he might have been doing when she was "not looking at him" (47, 48). It is indeed difficult to see why the Board preferred this negative and inconclusive testimony to the affirmative and specific testimony of the officers that they *did see* Stallings throw the nails and tacks.

Having upon it the admitted burden of proving by the preponderance of the evidence (Board's Brief in Court of Appeals p. 16 and 29 U. S. C. A. 160 (c) ) that Stallings did not engage in the misconduct in question, it is submitted that the Board did not, upon the record outlined above, sustain such burden and that the Court below erred in holding that the Board had done so.

## II

***In Any Event, the Board Was Without Power to Direct the Petitioner to Employ Stallings, Since it Was Established, and Indeed Conceded, That the Petitioner Had No Anti-Union and No Anti-Concerted-Activity Intent or Purpose Whatever in Denying Employment to Stallings.***

Whether Stallings did engage in misconduct or did not engage in misconduct, there is no evidence and no claim that the Petitioner refused employment to him *because of* his participating in any activity of any nature protected

by the Act. It is true, of course, that he went on strike, as did hundreds of other employees, and stood in the picket lines, as they did. If his doing this or his engaging in any phase of unionism or union activity had been the reason, or an ulterior reason, for the Petitioner's denying work to him, then the Petitioner would have been in violation of the Act.

But it is undisputed, and expressly conceded[2] by the Board (Tr. 215, Board's Brief in Court of Appeals p. 10, 13-15) that *the true reason, the whole reason* and *the only reason* why the Petitioner denied employment to Stallings at the end of the strike was a good faith acceptance by the Petitioner of the report that Stallings had strewn nails or tacks at the entrance to the Plant. For the Petitioner to have denied employment to Stallings because of this report, and *for no reason whatever except this report*, was not a violation of the Act, regardless of whether this report be now held to have been incorrect or not.

This would, of course, not be true if the strike here had been an unfair labor practice strike. Likewise, even though this was, as the Board admits, purely an "economic" strike, still if there were any element in the situation from which it could be inferred that the Petitioner's explanation for refusing employment to Stallings was but a pretext and that in truth and reality it denied

---

[2]The Board could hardly do otherwise then so concede in view of the fact, as noted above, that there is no claim of Stallings being any sort of leader in the Union or in the strike; that hundreds of employees were, as he was, members of the Union; that they, like he, went on strike and stood in the picket lines—but were, all of them, unhesitatingly taken back to work by the Petitioner, including among them all of the committeemen, stewards, officers and leaders of the Union.

him employment because of his being a member of the Union, or because of his going on strike, or because of his taking part in picketing—or if there were in the case any evidence of any sort from which it could be concluded that the ultimate truth of the matter was that the Petitioner acted against Stallings because of considerations or purposes inhibited by the Statute—then, and in such case, the Petitioner would have been in violation of the law. But it being absolutely clear, as the Board admits, that the Petitioner did not in truth and in reality act out of any such considerations, the law has not been violated.

The Board and the Court below disregarded these fundamental principles and adopted instead this far-reaching proposition (Board's Brief in Court of Appeals p. 11-15; B. A. 16; 8)—that in case of an economic strike, if a striker whose job has not been filled and who has not been guilty of misconduct is, upon returning to work, denied employment, then his employer is violating the Statute, *absolutely and as a matter of law* — even though it be not shown or claimed that the denial was for anti-union or anti-concerted-activity reasons and even though it be conceded indeed that the denial of employment was not for such reasons. It is respectfully submitted that this represents a basic misconception at the Statute and is thoroughly erroneous.

Nowhere and under no circumstances does the Statute entitle any person to employment, or guarantee a job to him, apart from anti-union or anti-concerted-activity actions on the part of an employer. Where no such employer actions are shown, and are indeed conceded to be completely absent from the picture, the Labor Board has no power whatever to grant or restore employment

to anybody. It has always been emphasized by the Courts, and indeed by the Board itself, that an employer may take action against an employee for any cause or reason, good or bad, *correct or erroneous,* grounded or groundless, provided only that the employer does not act *because of* the employee's engaging in union or concerted activity.

In *Rubin Brothers Footwear vs. National Labor Relations Board,* the United States Court of Appeals for the Fifth Circuit recognized the fundamental nature and import of this principle and expressly rejected the ruling which the Court below has accepted. The Court of Appeals for the Fifth Circuit said:

> ". . . It is perfectly plain that Examiner and Board tried and determined the case as to her on the same *incorrect theory* followed in the Rawlins' case, that Dean *as a striking employee had a right to be reinstated,* and that the Petitioners must, therefore, show that she had forfeited that right. Having voluntarily left Petitioners' employ to go out on strike, she had the right and *only the right,* if she applied before she was replaced, not to be refused reinstatement *merely because she had gone out on strike or for any other union activity.*" (Emphasis supplied).
>
> *Rubin Brothers Footwear vs.*
> *National Labor Relations Board,*
> 203 F2d 486, 488 (C. A. 5)

In the present case the Board concedes that the Petitioner did not act against Stallings *because of* his belonging to the Union, nor *because of* his going on strike, nor *because of* his being a picket, nor *because of* his en-

gaging in any other union or concerted activity.[3] Therefore, the Board had no power whatever to direct the Petitioner to give employment to Stallings.

The Board has itself so held in the past.

> "To the extent that our dissenting colleague relies on the *Fafner* case as standing for the Proposition that, subject to certain conditions not here present, a striking employee has an absolute right to be reinstated to his job, we feel that he is in error. For clearly, the *'right of a striker to be re-employed* upon the re-opening of the plant or the termination of the strike,' referred to in the *Fafner* case, *can be construed to mean only that a striker may not be denied work for discriminatory reasons.*" (Emphasis supplied).
>
> *National Grinding Wheel Co., Inc.*
> 75 NLRB No. 112; 21 L. R. R. M. 1095

The matter may be analyzed in this manner. In the action which the employer takes, what is he in truth striking at? If the target which he is in truth seeking to hit be not a thing protected by the Statute, then he is not violating the Statute—even though it be later proved that he was mistaken in thinking that such target was present. The target which the employer here was genuinely striking at was the strewing of nails and tacks. The strewing of nails and tacks is not a thing protected by the Statute. Therefore, the Petitioner was not violating

---

[3]In this connection it will be noted upon reading the "cease and desist" notice which the Petitioner has been ordered to post, how unrelated and inapplicable the language of the notice is to the actions of the Petitioner in this case (B. A. 33).

the Statute—even though it be now found that the strewing of nails and tacks was, in this instance, absent.

Thus, it is submitted that the Board and the Court below seriously erred in adopting the view that it is immaterial that the Petitioner "may have acted in good faith" (Board's Brief in Court of Appeals p. 14), and may have been free of any "animus" (Board's Brief in Court of Appeals p. 15), and was "not activated by opposition to the employees protected activities" (Board's Brief in Court of Appeals p. 15). The true and governing principle is fundamentally, specifically and precisely to the contrary.

The Court below has heretofore recognized this.

> "We do not lose sight of the fact that our inquiry is centered upon the *motivating cause* of the employer's action . . . Aware of the burden of proof that is imposed upon the Board in proving the employer's dominant *motivation* in discharging the employee, cf. *National Labor Relations Board vs. Remington Rand, Inc.*, supra, 94 F2d, at page 872, we are of the opinion that the evidence advanced to support this finding of discrimination is not substantial." (Emphasis supplied).
>
> *Martel Mills Corporation vs.*
> *National Labor Relations Board,*
> 114 F2d 624, 631, 632 (C. A. 4)

This Court has clearly pointed out that in such cases the crux of the matter is the motive and purpose behind the employer's act. And from *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1 to the very recent cases of *Radio Officers Union,*

et al *vs. National Labor Relations Board* this Court has held:

> "That Congress intended *the employer's purpose in discriminating to be controlling* is clear."
>
> *Radio Officers Union*, et al *vs. National Labor Relations Board* ..... U. S. ..... ; 33 L. R. R. 27 (February 1, 1954)

> "The Statute does not preclude a discharge on the ostensible grounds for the Petitioner's action; it forbids discharge for what has been found to be the *real motive* of the Petitioner." (Emphasis supplied).
>
> *The Associated Press vs. National Labor Relations Board,* 301 U. S. 103, 132; 81 L. Ed. 960

> ". . . It is found that . . . the action taken by the Respondent was *with the purpose* to discriminate against those most active in the Union." (Emphasis supplied).
>
> *National Labor Relations Board vs. Mackay Radio & Telegraph Company,* 304 U. S. 333, 347; 82 L. Ed. 1391

It is submitted that all cases involving issue as to whether a termination of employment has or has not violated the Act turn on this inquiry:—What was the employer's *true purpose* — what was his *real motive* — in severing the employment?

It has never been denied that this is the test in determining whether an employer has violated the Act

in discharging a working employee.[4] Yet paradoxically, in the present case, it is held that the employer has greater duty to a striking employee than to a working employee.

For example, if an employer genuinely believes that a working employee has damaged a piece of machinery in his Plant and discharges the employee *purely and solely on this account*, it is clear that the Labor Board cannot require the reinstatement of the employee—no matter that the employer is proved to have been mistaken in his belief. Likewise, if the employer genuinely believes that a striking employee, while standing on a picket line, has damaged a piece of the employer's machinery or equipment outside the Plant and discharges the employee *purely and solely on this account*, is it not equally beyond the Labor Board's authority to require reinstatement of the employee—no matter that the employer is proved to have been mistaken in his belief?[5] Is there any reason in law

---

[4]Indeed good faith and proper motive have always been held to be the ultimate test, not only as to whether an employer has violated Section 7 and 8 (a) (3) of the Statute in acting against employees with respect to their employments, but also as to whether an employer has violated Section 8 (a) (5) of the Statute in failing or refusing to deal with representatives of employees. See, for example, *National Labor Relations Board vs. James Thompson & Co.*—F2d —(C. A. 2); C. C. H. Labor Cases p. 84, 944.

[5]The law is, of course, that an unreplaced striker, during an "economic" or non-unfair labor practice strike, remains an employee in precisely the same sense that he would be an employee if at work during a time of no strike.

> "If there was a current labor dispute, the men were still employees by virtue of Section 2 (3), and the refusal to let them work was a discharge."
>
> *National Labor Relations Board vs. Mackay Radio & Telegraph Company*, 304 U. S. 333, 349; 82 L. Ed. 1392

or logic why the Board should have jurisdiction and power in the latter case and not in the former?

In the past, in a decision already quoted in part above, the Board considered this exact question and sharply rejected the anomaly which it and the Court below have now embraced in the instant case.

> "To the extent that our dissenting colleague relies on the *Fafner* case as standing for the proposition that, subject to certain conditions not here present, a striking employee has an absolute right to be reinstated to his job, we feel that he is in error. For clearly, the *'right of a striker to be re-employed* upon the re-opening of the plant or the termination of the strike', referred to in the *Fafner* case, *can be construed to mean only that a striker may not be denied work for discriminatory reasons. Otherwise, a striker would have more job security than a working employee* who, in the language of the Supreme Court (*Associated Press vs. National Labor Relations Board,* 301 U. S. 103, 132, see also *National Labor Relations Board vs. Mackay Radio & Telegraph Company,* supra) may be discharged for any reason other than Union activity or agitation for collective bargaining." (Emphasis supplied).
>
> *National Grinding Wheel Co., Inc.,*
> 75 NLRB No. 112; 21 L. R. R. M. 1095

The Court below seems to rest its decision essentially upon the thought that the Act does not "expose the innocent employee to the hazard of his employer's mistake" and that:

> "As between the victim of the mistake and the person who made the mistake, it seems just that the

perpetrator bear the onus of his own error rather than that the burden of this error should be shifted to the employee who cannot guard against it."

. . .

"In that light, the superior equities would seem to lie with the injured but innocent employee. Balancing the conflicting social interests here involved, we believe the dominant interest to be subserved, at the expense of the servient interest which must be sacrificed, is the interest of the employee."

*National Labor Relations Board vs. Industrial Cotton Mills (Division of J. P. Stevens & Co., Inc.)*
208 F2d 87, 91-92 (C. A. 4)

The clear, positive and unassailable answer to this is that it is not the function of the Labor Board or the Courts, under the National Labor Relations Act, to weigh equities, nor correct employer mistakes, nor shift the burden of employer errors, but to ferret out and remedy anti-union and anti-concerted-activity discriminations on the part of employers. There is no provision in the Statute which protects employees from being unjustly or unreasonably or mistakenly acted against by their employer. The Statute simply prohibits employers from acting against employees for anti-union or anti-concerted-activity reasons.

There are undoubtedly many misfortunes which employees suffer as a result of mistakes and mistaken beliefs on the part of their employers. Absent, however, the unlawful aim and purpose which is prohibited by the National Labor Relations Act, that Act does not purport

either to punish or to correct such mistakes. In holding otherwise the Court below, it is respectfully submitted, has inadvertently written a broad and radical enlargement into the Act.

---

Upon all of the foregoing, the Petitioner earnestly prays the Court to review the decision which the Court below has rendered in this case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
*Attorney for the Petitioner*

*Of Counsel:*
PIERCE AND BLAKENEY

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 11 |
| Appendix | 12 |


## CITATIONS


*Cases:*

| | |
|---|---|
| *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898 | 5, 6 |
| *Morand Brothers Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576 | 5 |
| *Morand Brothers Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529, certiorari denied, 346 U.S. 909 | 4, 5 |
| *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748 | 5 |
| *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847 | 7 |
| *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811 | 7, 8 |
| *National Labor Relations Board* v. *Don Juan Co.*, 185 F. 2d 393 | 6 |
| *National Labor Relations Board* v. *Local Union No. 1229*, 346 U.S. 464 | 5, 9 |
| *National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F. 2d 924, certiorari denied, 346 U.S. 818 | 4 |
| *Radio Officers' Union* v. *National Labor Relations Board*, No. 5, this Term | 6, 7 |
| *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 | 7, 8 |
| *Rubin Brothers* v. *National Labor Relations Board*, 203 F. 2d 486 | 10 |
| *Wilson & Co.* v. *National Labor Relations Board*, 33 LRRM 2530 (C. A. 8, February 16, 1954) | 10 |

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*):

| | |
|---|---|
| Section 7 | 12 |
| Section 8 (a)(1) | 12 |
| Section 8 (a)(3) | 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1953

---

No. 582

INDUSTRIAL COTTON MILLS (DIVISION OF J. P. STEVENS & CO., INC.), PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court below (R. 112-121) is reported at 208 F. 2d 87. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1-32) are reported at 102 NLRB 1265.

### JURISDICTION

The decree of the court below was entered on November 9, 1953 (R. 121-122). The petition for a writ of certiorari was filed on February 8, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

### QUESTION PRESENTED

Whether an employer engages in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act when he denies reinstatement to an unreplaced striker, basing the denial on his mistaken belief that the employee has engaged in strike misconduct.

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, p. 12.

### STATEMENT

In 1951, the Union (Textile Workers Union of America, CIO) was the recognized collective bargaining agent at petitioner's Rock Hill, South Carolina, plant, representing a production and maintenance unit of 1,057 employees (R. 6; Tr. 462-463). On April 2, 1951, as a result of a dispute over contract terms, the employees went out on strike (R. 6; 35). Substantially all the employees in the unit joined the strike, and for a time the plant was completely shut down (R. 6; 35). However, about August 20, 1951, the Union capitulated and the bulk of the employees ended their strike and sought reinstatement (R. 6; 36).

Employee Matthew C. Stallings had been employed as a card grinder for about five years (R. 39). He joined the strike at its beginning and took part in the picketing (R. 39, Tr. 104).

On July 31, during the strike, Stallings was standing among a group of people on a street cor-

ner near the plant (R. 14-15; 55-56, Tr. 280). After he had been standing there for about half an hour, two policemen (Arve and Wilson) emerged from the plant and approached him (R. 14-15; Tr. 260, 285-286). They accused him of having thrown tacks on the street, and asked him whether he had seen tacks thrown by anyone else (R. 15; 41). Stallings denied throwing any tacks, and answered that he had not seen any tacks thrown (R. 15; 41). His testimony to this effect was corroborated by a disinterested witness not connected with the strike (R. 15; 55-57).

The policemen did not formally place Stallings under arrest or take him to the police station, as they had done in the cases of employees Aiton and Crouch, whom they had apprehended in the act of throwing and setting up tacks in the street (R. 12, 15; Tr. 96-97, 115, 260). Instead, Stallings was released from custody at the plant (R. 12, 15; Tr. 261). He was never served with a warrant, as were Aiton and Crouch (R. 12, 15; 40, Tr. 96-97). Nor was he ever brought to trial for a misdemeanor, as was Crouch (R. 12, 15; 40-41, Tr. 116).

When Stallings applied for reinstatement at the conclusion of the strike, petitioner refused to hire him on the ground that he had thrown tacks into the street (R. 11; 37, 40, 46). Petitioner did not contend that Stallings had been replaced during the strike or that his former job was no longer available (R. 7).

The Board found that petitioner had an "honest belief" that Stallings had engaged in strike misconduct (R. 12). The Board further found, how-

ever, that Stallings was innocent of the misconduct attributed to him (R. 16). The Board concluded that an unreplaced striker is entitled to reinstatement; that this right is not subject to defeasance by the employer's mistaken belief that the striker has misconducted himself; and that the refusal to reinstate Stallings, based on petitioner's mistaken belief that he had engaged in strike misconduct, constituted a violation of Section 8(a)(1) and (3) of the Act (R. 8-9, 16). Accordingly, the Board entered an order requiring petitioner to cease and desist from the unfair labor practice found, or from in any related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 2). Affirmatively, the Board's order requires petitioner to reinstate Stallings with back pay and to post appropriate notices (R. 2-3).

Insofar as applicable to employee Stallings, the court below affirmed the Board's findings of fact as substantially supported, agreed with its conclusions of law, and entered a decree enforcing the Board's order (R. 112-122).

## ARGUMENT

1. It is settled law, as the court below held (R. 117), that "the refusal of an employer to reinstate a striker, whose place has not been filled, constitutes a violation of Section 8(a)(1) and (3),[1] and

[1] In addition to the cases cited by the court below, see, for recent illustrations, *National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818; *Morand Brothers Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 534 (C.A. 7),

equally clear is the right of the employer to refuse reinstatement when the striker has actually been guilty of serious strike misconduct."[2] Petitioner contends, however, that the right to reinstatement may be defeated not only by the unreplaced striker's own act of misconduct, but also, even though the striker is actually innocent of wrongdoing, by the employer's reasonable and sincere belief that he has misconducted himself.

Under petitioner's theory, the statutory protection extended to a blameless unreplaced striker is not a firm guarantee, but fluctuates with the correctness of the employer's observations or the accuracy of his sources. Hence, "To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind." *Cusano* v. *National Labor Relations Board,* 190 F. 2d 898, 902 (C.A. 3). But the employer's privilege of refusing reinstatement to a striker who has been replaced or has engaged in misconduct marks the limit of the risk the employee runs by striking. Where the employee has neither been replaced nor engaged in misconduct, the limit is as much overstepped, and the employee is as much harmed, whether the denial of reinstatement results from the employer's mistake or from his animus. For in either case, without being replaced and without having misbehaved, the striker

---

certiorari denied, 346 U.S. 909, and previous decision, 190 F. 2d 576, 583 (C.A. 7); *National Labor Relations Board* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 750 (C.A. 9).

[2] *National Labor Relations Board* v. *Local Union No. 1229,* 346 U.S. 464, 478, n. 13.

has nevertheless lost his job. It is true that where the loss results from the employer's good faith mistake, the employer's attitude is not censurable; but the employee too is free of blame. As between the victim of the mistake and the person who made the mistake, it is just that the perpetrator bear the onus of his own error rather than that the burden should be shifted to the employee, who cannot guard against it and whose statutory right is being curtailed by it. *National Labor Relations Board* v. *Don Juan Co.*, 185 F. 2d 393, 394 (C.A. 2).

Petitioner contends, however, that the sole conduct by an employer against which the Act safeguards employees is that motivated by an attitude hostile to union or concerted activity. This contention has been sapped of vitality by *Radio Officers' Union* v. *National Labor Relations Board*, No. 5, this Term, where this Court held that intent is sufficiently established if the union-discouraging effect is a foreseeable consequence of discrimination based on protected activity. Slip op. pp. 24-25. Indeed, in illustrating its statement that "proof of certain types of discrimination satisfies the intent requirement," this Court cited the decision below in the instant case to exemplify the very proposition which the petition challenges. *Id.*, p. 24, n. 53. In the same note and in the same connection, the Court also cited *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898 (C.A. 3), which is indistinguishable from the decision below [3] and which the

[3] In *Cusano*, an employee reported to a union committee that at a conference to discuss a consent election agreement, at which the employee was present, the employer stated that his interstate business exceeded $500,000. The employer mis-

court below quoted to support its conclusion (R. 119). Finally, this Court cited *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847 (C.A. 8) (Slip op. p. 24, n. 53) and explained *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (Slip op. p. 25), to illustrate the proposition that a showing of animus was unnecessary to establish unlawful discrimination, and both these cases were similarly relied upon by the court below (R. 119, 120). We submit, in a word, that this Court's decision in *Radio Officers' Union* has undercut the premise upon which the instant petition is predicated.

Furthermore, as the Board explained in this case (R. 16, n. 6), "even assuming *arguendo* that the questions of good faith and motive are relevant at all, they can only be relevant to the issue of whether [petitioner] violated Section 8(a)(3), not to the issue of [petitioner's] violation of Section 8(a)(1)." In determining whether, in violation of Section 8(a)(1), acts by an employer "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," it has never been doubted that the conduct is prohibited if its objective impact abridges the exercise of the rights vouchsafed the employees, whatever the motive for the infringement. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Illinois*

---

takenly, but in good faith, believed that the employee reported that the employer's *profits* exceeded $500,000. The employer accused the employee of misrepresentation; the employee denied it in substance; but the employer nevertheless discharged him.

*Tool Works,* 153 F. 2d 811, 814 (C.A. 7). From this viewpoint, the question is whether the right to strike—a concerted activity for mutual aid or protection safeguarded by the Act—is impeded if an unreplaced striker who has engaged in no misconduct may be denied his job because the employer erroneously thinks he has misbehaved. Petitioner does not suggest that in "working out an adjustment" in this situation (*Republic Aviation, supra,* at 797) between the employee's right to strike and the employer's plea that he meant no harm, the Board has effected an unreasonable accommodation of the competing interests; petitioner simply denies that the Board has power to effect any adjustment at all (Pet. 19-20). But it cannot be doubted that the Act did entrust "to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation, supra,* at 798. And to petitioner's complaint that the Board's decision proceeds from the misconception that the Act makes a "guarantee *of a job* to an employee" (Pet. 5, 12), it is enough to say that the question is not nearly so broadly gauged. As the court below pointed out (R. 117), we are not concerned with conduct "without the ambit and beyond the purview of the National Labor Relations Act"; rather, we are concerned with whether a striker runs the risk of losing his job "on account of the employer's honest but mistaken belief that * * * [he] had been guilty of *strike misconduct,*" that is, "misconduct arising out of, developed by, or closely connected

with, the strike." This is surely within the field which the Act undertakes to regulate.

The balance struck by the Board in this case appears to have been inferentially approved by this Court in *National Labor Relations Board* v. *Local Union No. 1229,* 346 U.S. 464. There, the employer discharged ten employees for the reason that they had engaged in the distribution of a handbill; finding that the distribution was in the circumstances an unprotected activity, the Board held that the employer was free to discharge the nine employees found to have distributed the handbill, but that the discharge of a tenth employee was unlawful because it was not shown that he had engaged in the misconduct attributed to him by the employer. 94 NLRB 1507, 1513. Referring with evident approval to the distinction between employees actually engaging in misconduct and those only believed by the employer to be so engaged, this Court said (346 U.S. at 474-475):

> * * * it often has been necessary to identify individual employees, somewhat comparable to the nine discharged in this case, and to recognize that their discharges were for causes which were separable from the concerted activities of others whose acts might come within the protection of § 7. It has been equally important to identify employees, comparable to the tenth man in the instant case, who participated in simultaneous concerted activities for the purpose of collective bargaining or other mutual aid or protection but who refrained from joining the others in separable

acts of insubordination, disobedience or disloyalty.

Petitioner suggests a conflict between the decision below and the decision of the Court of Appeals for the Fifth Circuit in *Rubin Brothers* v. *National Labor Relations Board,* 203 F. 2d 486 (Pet. 13). It is clear, however, that the passage petitioner quotes for this suggestion was unnecessary to the Fifth Circuit's decision. For the court there went on to hold that the employee in question "was not refused reinstatement at all" (203 F. 2d at 488), apparently concluding that she was not restored to employment merely because she applied for work when none was available and failed to report when work was available (cf. 99 NLRB 610, 612-613, 622-624). In any event, even if a conflict did exist, this Court's supervening decision in *Radio Officers' Union* has substantially resolved it in favor of the decision below without the need for further review.[4]

---

[4] Since the petition was filed in this case, the Court of Appeals for the Eighth Circuit, in *Wilson & Co.* v. *National Labor Relations Board,* 33 LRRM 2530, 2534 (February 16, 1954), stated that "the company had reasonable grounds to believe that the named employees had engaged in the unprotected strike activities and that in reliance upon such belief refused to reinstate them. If they were so discharged then they were not entitled to reinstatement." This statement, however, follows evident rejection (33 LRRM at 2533) by the Eighth Circuit of the Board's finding that the strikers denied reinstatement had *not* engaged in strike misconduct. On this view, the Eighth Circuit is holding that strikers who actually engaged in misconduct, and who are denied reinstatement by their employer in reliance on his reasonable belief that they have misconducted themselves, are not entitled to reinstatement. This is an accurate statement of the law and we are strengthened in our belief that this may be the Eighth Cir-

2. The petition attacks, but does not present as a question, the finding of the Board that employee Stallings was innocent of the strike misconduct attributed to him by petitioner (Pet. 8-10). As the court below held (R. 116), the finding is based on "a resolution of conflicting testimony, involving a question of credibility, which is binding on us." It obviously presents no issue warranting review.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*

GEORGE J. BOTT,
*General Counsel,*
DAVID P. FINDLING,
*Associate General Counsel,*
DOMINICK L. MANOLI,
*Assistant General Counsel,*
BERNARD DUNAU,
*Attorney,*
*National Labor Relations Board.*
MARCH 1954.

---

cuit's holding by its failure to mention the decision below, the related decisions cited below, or this Court's decision in *Radio Officers*. The Board has filed a motion with the Eighth Circuit to clarify its holding, and the union in that case has filed a petition for rehearing.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 290939 1021

No. 582

6

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

No. 14,876.

Local No. 3, United Packinghouse Workers of America, CIO,
Petitioner,
vs.
National Labor Relations Board and Wilson & Co., Inc.,
Respondents.

Petition to Review order of National Labor Relations Board.

No. 14,883.

Wilson & Co., Inc., a Corporation,
Petitioner,
vs.
National Labor Relations Board,
Respondent.

Petition to Review order of National Labor Relations Board.

[February 16, 1954.]

Allen Heald for Local No. 3, United Packinghouse Workers of America, CIO.

John L. Cockrill (Thomas Freeman, Louis R. Simpson, Howard C. Parson and Francis X. Reilly, Jr., were with him on the brief), for Wilson & Co., Inc.

Irving M. Herman, Attorney, National Labor Relations Board (George J. Bott, General Counsel, National Labor Relations Board, David P. Findling, Associate General Counsel, National Labor Relations Board, A. Norman Somers, Assistant General Counsel, National Labor Relations Board, and Frederick U. Reel, Attorney, National Labor Relations Board, were with him on the brief), for National Labor Relations Board.

---

Before GARDNER, Chief Judge, and THOMAS and COLLET, Circuit Judges.

---

GARDNER, Chief Judge.

This was a proceeding before the National Labor Relations Board in which Locals 3, 6 and 37 of the United Packinghouse Workers of America, CIO, filed charges with the National Labor Relations Board in the fall of 1948 alleging that Wilson & Co., Inc., the owner and operator of meat packing plants at Faribault, Minnesota, at Albert Lea, Minnesota, and at Cedar Rapids, Iowa, had discriminatorily discharged and refused to reinstate certain named employees whom the unions represented for collective bargaining purposes because of their union activities and affiliations and had failed to reinstate them for like reasons. While the original charges were filed in the fall of 1948 no complaint was issued by the National Labor Re-

lations Board based thereon until June 27, 1952, nearly four years after the filing of the original charges.

Strikes occurred and were carried on at each of the company's plants from March 16, 1948, until June 7, 1948, and were conducted in such a violent and destructive manner that the governor of the state of Minnesota and the governor of the state of Iowa each called out the National Guard of his respective state to protect the company's property, preserve the public peace and prevent threatened damage to persons and property by the striking employees. Injunctions against the strikers were also issued for like reasons.

The complaint as finally issued upon the charges filed alleged that the company had discharged and failed and refused to reinstate certain named employees because they had engaged in a strike and other concerted activities for the purpose of collective bargaining or other mutual aid or protection, with the intent to discourage membership in the local unions and the concerted activities of its employees. The complaint then alleged that the company's acts constituted discrimination in regard to hire and tenure of employment and terms and conditions of employment of its employees and for that reason constituted unfair labor practices within the provisions of the National Labor Relations Act.

The company by its answer denied all charges of unfair labor practices contained in the complaint, pleaded that the strike was an unlawful one because it had been called before the expiration of the contract between the company and its employees and that because of such action they lost their status as employees.

The answer also affirmatively pleaded that the employees named in the complaint were denied re-employment for

illegal or unlawful acts or misconduct during or after the strike or for permitting reinstatement rights to lapse or for failure to report for work after the strike on proper notice or were not employees at the start of the strike, and not because of their union activities or affiliations. It was also alleged that the complaint contained names of certain individuals whose claims had been fully settled and released in accordance with an agreement of October 5, 1950, between the company and the union with the approval of representatives of the National Labor Relations Board.

The case was heard before a trial examiner of the Board who heard the testimony on the issues presented.

The Board, in support of the allegations of its complaint, introduced evidence showing that the individuals enumerated in the complaint as having been discriminatorily refused reinstatement because of their union activities were employees of the company at and prior to the time the strike was called; that they participated in the strike; that they were members of the union and that following the strike they reported for work and were denied employment. The company introduced evidence as to the acts of violence committed by the striking employees and evidence tending to show that the employees named in the complaint participated in certain unprotected activities in connection with the strike. The acts of violence shown by the testimony included tipping over automobiles of non-striking employees or supervisors, threatening non-striking employees or supervisors with bodily harm, blocking ingress to or egress from company plants assaulting non-striking employees or supervisors, throwing rocks at non-striking employees or supervisors, and publicly vilifying supervisors or non-striking employees. It also made proof that other employees who had participated in the strike but who had not taken part in these unprotected activities were

reinstated although they were equally prominent in the union and its activities. The company also offered proof that as to five of the employees listed in the complaint two were discharged or refused reinstatement for failure to report to work after the strike, one was discharged for walking off his job, one was discharged or refused reinstatement for failure to make timely return from a leave of absence, and one was refused reinstatement because his job had been eliminated.

The trial examiner in his report to the Board rejected all the company's defenses and found that the company had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act as to all individuals named in the complaint and recommended that the company be ordered by the Board to cease and desist from interfering with employees' rights and to reinstate and make whole each of the individuals named in the complaint.

The Board adopted the findings and recommendations of the examiner except as to one Harry L. Wright as to whom the proceeding was dismissed because he had been discharged for leaving his work before his regular relief time and not for his union activities or affiliations.

It will be necessary to make further reference to the evidence in this case during the course of this opinion.

Subsequent to the entry of the order of the Board, Local No. 3, United Packinghouse Workers of America, CIO, was on application permitted to intervene for the purpose of filing petition for review. Petitions for review have been filed by the company and also by Local No. 3, United Packinghouse Workers of America, CIO. The union in its petition seeks only a modification of the Board's order to the extent that the dismissal of the complaint as to Harry L. Wright be reversed and that he be included in the list of

those to be reinstated with back pay and that the order be further modified so as to allow interest to such employees as are ordered reinstated, on the back pay which shall be found to be due them.

The company by its petition for review challenges the validity of the order and the findings on which it is based substantially on all the grounds pleaded in its answer.

The burden of proving the charges of unfair labor practices charged in the complaint was upon the Board. *N.L.R.B.* v. *Reynolds International Pen Co.*, 7 Cir., 162 F.2d 680; *N.L.R.B.* v. *National Die Casting Co.*, 7 Cir., 207 F.2d 344; *American Smelting & Refining Co.* v. *N.L.R.B.*, 8 Cir., 126 F.2d 680. The basis of these charges was that the dismissal of the employees named in the complaint and the refusal to reinstate them was because of their union activities or affiliations and hence, was discriminatory within the purview of the National Labor Relations Act. The jurisdiction of the Board is a limited one and it cannot concern itself with the management of the business of employers nor with the matter of discharges of employees unless such discharges are prompted by union activities or affiliations of the employees. If an employee is wrongfully discharged by his employer he must seek recourse in a court of law unless the discharge be for the union activities or affiliations of the employee. *American Smelting & Refining Co.* v. *N.L.R.B., supra; N.L.R.B.* v. *Montgomery Ward & Co.*, 8 Cir., 157 F.2d 486. In *American Smelting & Refining Co.* v. *N.L.R.B., supra,* it was said:

"The Act gives the Board no supervisory powers over the conduct of a business, nor may it concern itself with the question of discrimination or wrongful discharge or other improper treatment of an employee, unless such acts were prompted by the employee's union activities or affiliations. The burden of proof on that issue rested upon the

Board to show by substantial evidence that the employee was discharged because of such activities or affiliations."

The question of the right to reinstatement or re-employment depends on whether or not the employee was discharged or refused reinstatement for his union activities. If an employee has been discharged or refused reinstatement for other causes, whether justly or unjustly, he is not entitled to reinstatement by order of the Board. In other words, the Act does not confer upon the employee any right of reinstatement if he has been discharged or refused reinstatement for any reason other than his union activities or affiliations. It is therefore of paramount importance in this, as in other similar cases, to consider the entire record for the purpose of determining whether the finding that the discharges or refusals to reinstate the employees involved were prompted by their union activities or affiliations is sustained by substantial evidence. We have examined the evidence bearing on this question of the cause of discharge or refusal to reinstate each of the employees named in the complaint. As has been observed the burden of proof to establish affirmatively by substantial evidence that the discharges or refusals to reinstate were because of union membership and activities and for the purpose of discouraging membership in the union was upon the Board and this burden at no time shifted to the company. The fact that the employer may introduce evidence tending to show other reasons for discharge or refusal to reinstate does not mean that the employer has the burden of proof of establishing such alleged cause but the evidence is admissible and pertinent because it tends to disprove the allegations of the complaint. But whether such evidence be introduced or not it is still the duty of the Board to prove the allegations in the complaint by substantial evidence. There was evidence tending to prove that each of these employees, save five discharged for other reasons, participated

in unprotected activities during the strike. True, the trial examiner found the evidence insufficient to sustain that charge. He did so by discrediting positive testimony in many instances and by crediting the negative testimony of the employee. The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility. Parties to these proceedings are entitled to a fair, unbiased and impartial hearing. *N.L.R.B.* v. *Phelps*, 5 Cir., 136 F.2d 562; *N.L.R.B.* v. *Acme-Evans Co.*, 7 Cir., 130 F.2d 477; *N.L.R.B.* v. *Sartorius & Co., Inc.*, 2 Cir., 140 F.2d 203. In *N.L.R.B.* v. *Phelps, supra*, it is among other things said:

"* * * a fair trial by an unbiased and nonpartisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand."

The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the record goes far to

weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts. A study of the entire record indicates that this bias and hostility prevailed not only in the weighing of the evidence but in the ruling of the court in rejecting pertinent evidence offered by the company. There was not only evidence tending to show participation in unprotected activities by the listed employees, save the five discharged or refused reinstatement for other reasons, but there were affidavits which had been furnished to the company before the refusal to reinstate these employees which in many instances positively connected these employees with acts of violence and it was shown without dispute that many outrageous acts of violence clearly beyond the bounds of legitimate strike activities had been committed. Indeed these had been perpetrated to such an extent and in such violence that it was necessary for the governors of the states where the plants are located to call out the militia of the respective states to quell mob violence and to prevent the destruction of property and the threat of injury to officers of the company and non-striking employees. These acts were confessedly committed by striking employees. Detailing the evidence with reference to the various acts of violence committed by the strikers and the evidence tending to connect the employees named in the complaint therewith, would extend this opinion to voluminous proportions and would serve no useful purpose.

Since the decision of the Supreme Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, it is incumbent upon this court in cases here on petition for review of an order of the National Labor Relations Board to consider the conflicting evidence and if it is our duty to consider it then we must pass upon its weight. In that case the court, referring to this question, said:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its *weight*. This is clearly the significance of the requirement in both statutes that courts consider the whole record." (Emphasis supplied)

In this connection it is to be noted that many of the company's striking employees were members of the union and quite as active and prominent in its affairs as those listed in the complaint but they were not refused reinstatement but when the strike was over they were re-employed. It does not appear whether all of the company's employees are members of the union or not but certainly a majority of them are members of the union and there is no evidence indicating any antipathy of the company against the union.

The evidence considered as a whole, including all the surrounding facts and circumstances, convincingly established that the company had reasonable grounds to believe that the named employees had engaged in the unprotected strike activities and that in reliance upon such belief refused to reinstate them. If they were so discharged then they were not entitled to reinstatement. *N.L.R.B.* v. *Arthur Winer, Inc.*, 7 Cir., 194 F.2d 370; *Ohio Associated Tel. Co.* v. *N.L.R.B.*, 6 Cir., 192 F.2d 664; *American Smelting & Refining Co.* v. *N.L.R.B., supra; N.L.R.B.* v. *Montgomery Ward & Co., supra; N.L.R.B.* v. *Stafford*, 8 Cir., 206 F.2d 19. In *N.L.R.B.* v. *Stafford, supra*, we said, "The fact in issue is the intent, motive or reason in respondents' mind for the discharge of the complainants." But quite aside from any proof produced by the company, a consideration

of the record as a whole, in our judgment, fails to disclose any substantial evidence that the employees listed in the complaint were either discharged or refused reinstatement because of their union activities. As said by us in *N.L.R.B.* v. *Montgomery Ward & Co., supra,* "Fragmentary and unrelated suspicions are not sufficient in substance to transform a proper exercise of discharge into an improper one." There was no direct evidence that the acts of the company complained of were prompted by the union activities of the employees nor are there any proven facts warranting such inference, and mere suspicion or conjecture can not be accepted as substantial evidence. As the finding of the Board that the discharges and failures to reinstate the employees named in the complaint were because of their union activities is not sustained by substantial evidence, the order of the Board should not be enforced.

However, it is urged by the company that the Board was without jurisdiction in the matter because the strike was an unlawful one in that it had been called before the expiration date of the contract between the company and the union. The strike was called March 16, 1948, whereas the contract did not expire until August 11, 1948. The Labor Management Relations Act of 1947, Section 8(d), contains provisions reading in part as follows:

"Provided, that where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification:

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior

to the time it is proposed to make such termination or modification;

* * * * * * *

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *" (29 U.S.C.A. Sec. 158(d)).

Section 8(d) further provides that:

"Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The strike was not called until after sixty days after the giving of the required notice. However, the expiration date of the collective bargaining contract between the company and the union expired later and hence it is argued that no strike could properly be called until after the expiration date of the contract. The Board strenuously argues that so construing the statute would to a considerable extent be destructive of its purpose. It is urged that so construed there could be no strike during the life of the contract between the employer and the union. That argument we think a very proper one to be addressed to the Congress and apparently it was urged upon Congress. Thus, if we may resort to legislative history despite the plain wording of the statute, it is observed that the Senate Committee on Labor and Public Welfare in its report among other things said:

"If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial

relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement there is little reason why an employer would desire to sign such a contract.

* * * * * * *

"Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties of such agreements, and will thereby promote industrial peace."

It also appears from the legislative history that Senator Taft made it clear that Section 8(d) required a waiting period before strikes and lock-outs *during the life of the contract* when he said:

"If such notice is given, the bill provides for no waiting period except during the life of the contract itself."

Senators Murray, Thomas and Pepper, members of the Senate Committee on Labor and Public Welfare, filed their Senate Minority Report No. 105, Part 2, 80th Congress, 1st Session, stating at page 22 thereof, in objecting to Section 8(d):

"Since not every collective-bargaining contract contains a no-strike clause, the effect of the proposal is to incorporate such provisions by legislative fiat. Although we believe that such provisions are eminently desirable, it is our further belief that such agreements should be reached voluntarily on friendly, valid collective bargaining. The sanction would then be that employees striking in violation of such an agreement would lose their right to reinstatement, as presently provided by both Board and Court decision."

Notwithstanding these arguments by opponents of the bill, however, it was passed by the Congress in its present

form. It is not ambiguous and can not be amended by interpretation. In *United Packinghouse Workers of America, et al.* v. *Wilson & Co., Inc.*, 80 F. Supp. 563, involving the same contract, the same union and the same strike here involved, the District Court for the Northern District of Illinois in addressing itself to this question said:

"* * * the complaint shows on its face that plaintiffs, by 'resorting to a strike' on March 16, 1948, and before the 'expiration date of such contract,' have violated the express mandate of Section 8(d) of the Labor Management Relations Act of 1947. Plaintiffs contend that their contract gave them the right to strike during its term. After the passage of the Labor Management Relations Act of 1947, such a contention would be contrary to the express policy of the Act and Section 8 thereof. Contracts, however express, cannot fetter the constitutional authority of Congress. *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U.S. 240."

A somewhat similar question was considered by the Court of Appeals for the District of Columbia in *Boeing Airplane Co.* v. *N.L.R.B.*, C.A.D.C., 174 F.2d 988. In that case the employees had called a strike without giving notice as required by Section 8(d) of the Act. In the course of the opinion it is said:

"Congress made Section 8(d) applicable to all contracts which were in effect on August 22, 1947. Its purpose was to provide a cooling-off period prior to a work stoppage. * * * the strike was not a lawful strike because of its (the union's) failure to comply with Section 8(d) of the Act. * * * the Company was at liberty to treat the employees as having severed their relations with the Company because of their breach of contract, and it was further at liberty to consummate their separation from the Company's employ by hiring others to take their places. See *National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U.S. 332, 344, 59 S. Ct. 508, 83 L. Ed. 682."

We are of the view that by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees of the company and hence, they were not entitled to re-employment as a matter of right. As this disposes of the issues raised by the petition for review filed by the union, as well as the questions raised by the petition for review filed by the company, we pretermit a consideration of other contentions urged by the respective petitioners.

The order of the Board will therefore not be enforced and the cause is remanded to the National Labor Relations Board with directions to dismiss the proceedings.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*